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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1969

RICHARD HALL, ET AL., APPELLANTS

v.

HARRIET BEALS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINION BELOW

The opinion of the three-judge district court (A. 15-26) is reported at 292 F. Supp. 610.

JURISDICTION

Appellants filed a complaint challenging Section 19-24-1 of the Colorado Revised Statutes (1963) on federal constitutional grounds (A. 1-6). A district court of three judges was convened pursuant to 28 U.S.C. 2281, 2284. The court's order refusing injunctive relief and dismissing the complaint was entered on October 30, 1968 (A. 15), and its opinion was handed down on November 28, 1968 (A. 15-26). Appel-

lants' notice of appeal to this Court was filed on December 13, 1968, and the Court noted probable jurisdiction on May 5, 1969 (394 U.S. 1011). Jurisdiction of this appeal rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether, consistent with the federal Constitution, a State may lawfully require a period of residence within the State which an otherwise qualified citizen must satisfy before being allowed to cast a ballot for the electors of the President and Vice President of the United States.

INTEREST OF THE UNITED STATES

This litigation is of interest to the United States since it involves the process of choosing the head of the executive branch of the federal government. The case also concerns the United States because of the national commitment embodied in the Voting Rights Act of 1965, "to enlarge representative government," "to solicit the consent of all the governed," and "to increase the number of citizens who can vote." [1]

Estimates of the number of citizens excluded from participation in the presidential election process because of State residence requirements vary from two to eight million potential voters in each national election (see App. Br. 19, n. 2). Standing alone, that figure represents a serious challenge to the goal of facilitating the active participation of all citizens

[1] Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., p. 17 (Attorney General Katzenbach).

in the electoral process. When considered in light of the closeness of the popular vote in two of the last three presidential elections—*i.e.*, a 100,000-vote plurality for the winner in 1960 and a 400,000-vote plurality for the victor in 1968, the significance of these residence restrictions becomes quite clear.

Attorney General Mitchell recently reaffirmed the commitment of the federal government "to the policy that it is in the national interest to encourage as many citizens as possible to vote and to discourage the application of unreasonable legal requirements." [2] He proposed legislation which would authorize all otherwise qualified persons resident in a State before September 1 of a presidential election year to vote in that State, and would permit those moving to another State after September 1 to vote in the State of their previous residence. See H.R. 12695, S. 2507, Sec. 2(c), 91st Cong., 1st Sess.[3]

But the government's interest here simply is not the product of a concern that as many citizens as possible participate in the election of the President. It also reflects the mobility of our modern society and the fact that much of this movement is directly caused, or at least indirectly induced or facilitated, by the federal government. The transfer of civilian and military personnel needed to operate various government offices and

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[2] Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., p. 219.

[3] See also H.R. 4793, S. 2165, 91st Cong., 1st Sess., and H.R. 10949, 90th Cong., 1st Sess., for similar legislative proposals.

installations, the hiring of persons to work for government agencies at places far removed from their homes, and even federal encouragement and participation in highway construction and other programs designed to improve the different modes of transportation, contribute to making the government responsible, in a rather direct way, for the disenfranchisement of many citizens who are unable to satisfy State residence requirements.[4]

STATEMENT

Appellants, on behalf of themselves and others similarly situated, brought this suit to enjoin the enforcement, execution and administration of Section 49–24–1 of the Colorado Revised Statutes (1963). That section provided, at the time the case was decided by the three-judge district court, that a citizen otherwise qualified to vote must have resided in the State not less than six months preceding an election of presidential and vice-presidential electors in order to be qualified to cast a ballot in that election.[5]

[4] Indeed, the Department of State has expressed a particular interest in this case insofar as it relates to its employees, and other American citizens, who reside abroad and often are frustrated in attempting to cast their ballots by residence restrictions and similar State-imposed limitations which effectively curtail the right of these individuals to vote freely in national elections.

[5] The applicable Colorado statute is reprinted in appellants' brief (p. 3). It was amended on April 23, 1969, however, after the decision below and subsequent to the filing of the jurisdictional papers in this Court, and now provides for a two-month residence period with respect to eligibility for voting in presidential elections, in lieu of the six-month period previously in effect (see App. Br. 3–4).

Appellants are a husband and wife who had moved from California to Colorado on June 15, 1968. They established residence in the State of Colorado by purchasing a home, taking permanent employment, registering their car with the Colorado Motor Vehicle Bureau and obtaining Colorado drivers' licenses. They became liable for Colorado taxes on the date they moved there. They both are over the age of 21 years and are citizens of the United States. They were registered to vote in California before moving to Colorado (A. 2–3).

Desiring to vote in the election of the President and Vice President of the United States held on November 5, 1968, appellants applied for absentee ballots from the State of California, but were refused them on the basis that they were no longer residents of that State. On or about August 1, 1968, appellants sought to register in Colorado in order to be able to vote in the 1968 presidential election. The Colorado election officials informed Mr. Hall that he and his wife would not be allowed to register to vote in that election because they failed to satisfy the six-month residence requirement. Pleas to the Secretaries of State of California and Colorado were unavailing.

Appellants then brought this action against the Clerk and Recorder and Election Supervisor of El Paso County (where they resided) in the federal district court for the District of Colorado. They sought a declaration that the pertinent Colorado statute was unconstitutional and an injunction against its enforcement. A district court of three judges was

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convened, pursuant to appellants' request. On October 30, 1968, the court entered a final judgment refusing the injunction and dismissing the complaint. The opinion of the court, handed down on December 2, 1968, concluded that the six-month Colorado residence requirement was "not so unreasonable as to amount to an irrational discrimination" (A. 24; 292 F. Supp. at 614). A direct appeal to this Court followed.

ARGUMENT

INTRODUCTION AND SUMMARY

1. At the outset, a question arises whether intervening events since the case was commenced make it an inappropriate vehicle for this Court to decide the issue tendered—the viability of residency as an effective limitation on the right of suffrage in presidential elections.

As noted in the Statement (see note 5, *supra*), in April 1969 (after the decision below) the Colorado legislature substituted a two-month residence requirement for the previous six-month requirement for voting in presidential elections. This case is not, however, like *Bell* v. *Maryland,* 378 U.S. 226, where the intervening legislative enactment, in effect, spoke to the very issue before this Court.[6] Thus, there is no reason

[6] In this regard, see *Gray* v. *Sanders*, 372 U.S. 368, where the Court held that the attack on Georgia's county-unit system of electing statewide officeholders was not mooted by an intervening determination to hold the election which had been enjoined on a popular vote basis. There the Court noted that "the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing" (*id.* at 376). Compare *Rice* v.

here for a remand to the district court. It has already given its approval to the concept of a period of required residence. And, although it might be suggested that reconsideration in light of certain recent decisions of this Court (*e.g.*, *Williams* v. *Rhodes*, 393 U.S. 23, *Shapiro* v. *Thompson*, 394 U.S. 618, and *Kramer* v. *Union School District*, 395 U.S. 621) would be appropriate, such a course would serve little purpose, for almost certainly the matter would return here through another direct appeal by the losing party for review. See *Mills* v. *Alabama*, 384 U.S. 214, 218; *Avery* v. *Midland County*, 390 U.S. 474, 478. Since the case has been briefed in light of all the decisions of this Court which the lower court might consider, it is unlikely that a remand would aid the Court in its consideration of the issue here involved.

Nor, under this Court's decisions, is consideration of the constitutional question foreclosed because the election of November 1968 has been held. Appellants' constitutional challenge, arising from a denial of their right to vote in presidential elections, seeks to resolve the issue in order to avoid future denials of the same right to appellants and members of the class they represent by any of the 43 States which, in addition to Colorado, impose waiting periods based on residence of

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Sioux City Cemetery, 349 U.S. 70, where, as the Court recently pointed out in *Jones* v. *Mayer Co.*, 392 U.S. 409, 418, n. 21, "the statute that belatedly came to the Court's attention * * * reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits." See also *Hunter* v. *Erickson*, 393 U.S. 385, 388–389.

from 30 days to two years that apply to presidential elections (see App. Br. 40).[7]

2. The central question presented by this appeal is whether a State's imposition of a residence restriction on an otherwise qualified citizen's right to participate in the presidential election process conflicts with rights protected by the Federal Constitution. In the government's view, such residence restrictions impermissibly abridge rights of national citizenship, namely, the right to travel among the various States without suffering a penalty attributable solely to the

[7] That appellants are now fully qualified to vote in all elections controlled by Colorado does not negate the past denials or the potential of future denials of constitutional rights to those similarly situated. In *Moore* v. *Ogilvie*, 394 U.S. 814, 816, this Court recently spoke directly to this point. That case involved independent candidates for President and Vice President who had sought and were refused a place on the ballot in Illinois in the November 1968 election, pursuant to an Illinois statute which the Court in its decision declared unconstitutional in spite of the fact that there was no effective relief which could be awarded the plaintiffs. In rejecting the mootness argument, the Court concluded that, because the burden of the Illinois statute would be effective in future elections, the case presented a continuing controversy in the federal-state area regarding voting rights and was suitable for a decision on the merits. See also *McDonald* v. *Board of Election*, 394 U.S. 802. Moreover, in *Dreuding* v. *Devlin*, 380 U.S. 125, affirming 234 F. Supp. 721 (D. Md.), which involved the identical issue presented here, this Court's *per curiam* decision was rendered on March 1, 1965, well after the 1964 presidential election. Here the Colorado statute will operate with similar effects in the next presidential election and thus potentially give rise to suits resulting from future disenfranchisement. Moreover, even though appellants are now qualified to vote in Colorado, which makes their situation somewhat different from that in *Moore*, they might move again prior to the next presidential election and encounter the same difficulties in a new jurisdiction.

exercise of that right, and the right to participate in the selection of the chief executive of the federal government on an equal basis with all other citizens of a State. Only a compelling State interest could save a regulation that abridges these fundamental rights, and, insofar as presidential elections are concerned, we believe no such justification exists.

There is of course a need for a short period of time prior to any election during which, for administrative purposes, the voting lists are closed. That is not, however, a persuasive explanation for the kind of residence requirement involved in this case. Indeed, here Colorado has separately spoken to this problem, allowing registration up to three days before an election. We conclude that any substantial waiting period based on residence which deprives an otherwise qualified citizen of the right to vote in a presidential election is unjustified.

I. COLORADO'S RESIDENCE REQUIREMENT INFRINGES RIGHTS OF NATIONAL CITIZENSHIP PROTECTED BY THE CONSTITUTION

What is at stake here—we repeat—is only eligibility to vote in *presidential* elections. To be sure, that matter has typically been made subject to the same requirements as are applicable in other elections. But that is not the necessary pattern, as efforts at legislative amelioration of the problem of the transient citizen in some States attest. See Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823 (1963); see also App. Br. 38–41. And, at all events, there is no

constitutional justification for burdening presidential elections with whatever residence qualifications may be appropriate in more local affairs.

With respect to other elections, including congressional elections, the propriety of requiring a period of residence in the constituency has long been assumed. See, *e.g., Carrington* v. *Rash,* 380 U.S. 89, 91; *Lassiter* v. *Northampton Election Board,* 360 U.S. 45, 50–51; *Pope* v. *Williams,* 193 U.S. 621, 632–633. And this is arguably condoned by the Constitution itself, which provides that those electing Senators (Seventeenth Amendment) and Representatives (Art. I., Sec. 2) for the federal Congress in each State will have the qualifications prescribed for electors of the most numerous branch of the State legislature. But no comparable provision governs presidential elections, and the arguments tending to justify residence requirements on the ground that they ensure interested participation and familiarity with local candidates and issues have little force here. Whatever the legitimacy of demanding a period of residence as a prerequisite to voting in other elections, the same considerations do not necessarily control in the instant situation.

Nor is the result effected by the constitutional prerogative which the States enjoy to *appoint* presidential electors rather than conduct a popular election. U.S. Constitution, Art. II, Sec. 1.[8] That was settled, if

[8] Under the scheme of the Constitution which gives to the electoral college the direct authority to choose the President and Vice President, those voting in a presidential election actually select electors, and do not cast ballots for candidates for these offices, at least in theory. But that does not undercut the position here espoused. In most States electors are required, directly

not earlier, last Term in *Williams* v. *Rhodes*, 393 U.S. 23.[9] The rule here, as elsewhere, is that stated in *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665: "[O]nce the franchise is granted to the electorate, lines may not be drawn [by the States] which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." See, also, *Cooper* v. *Aaron*, 358 U.S. 1, 16–17; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344–345. Thus, the question is whether there is any rational justification for requiring a period of

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or indirectly, to cast their votes for the candidates they have declared themselves for and are pledged to support, so that, in a real sense, the voters are casting a ballot in favor of a specific presidential candidate. See generally Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 Law & Contemp. Prob. 188, 191 (1962); Heinlein, *Presidential Election Procedures*, 35 U. Cinc. L. Rev. 1 (1966). Indeed, most States now use the so-called "short ballot" in presidential elections, in which only the names of the actual candidates, and not the electors' names, are listed. See, *e.g.*, Kirby, *Limitations on the Power of State Legislatures over Presidential Elections*, 27 Law & Contemp. Prob. 495, 507–508 (1962); Comment, 21 Sw. L.J. 269, 273–274, n. 27 (1967).

[9] There the Court pointed out that, despite the broad language of Art. II, Sec. 1, regarding the authority of the States in determining the manner of selecting electors, "those granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution" (*id.* at 29). The Court concluded that "the power to select electors could [not] be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws" (*ibid.*), and "reject[ed] the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions" (*ibid.*). In sum, "no State can pass a law regulating elections that violates the Fourteenth Amendment's command" of equal protection of the laws (*ibid.*).

residence for voting in presidential elections; if not, considering the rights affected, the Constitution bars distinctions made on this ground.

A. THE RIGHT TO TRAVEL

Last Term in *Shapiro* v. *Thompson*, 394 U.S. 618, in declaring unconstitutional one-year residence requirements for eligibility for welfare assistance, this Court reiterated the holding of a number of previous decisions [10] that the right to travel freely among the several States is a fundamental right guaranteed and protected by the federal Constitution. And, significantly, the Court found it unnecessary to ascertain whether a significant number of persons were actually deterred from moving because of the residence requirement. The very fact that the requirement classified people on the basis of whether or not they had recently moved to the State, and denied them welfare benefits if they had, was held to impose an impermissible burden on the right to travel absent a com-

[10] *Passenger Cases*, 7 How. 283, 492; *Crandall* v. *Nevada*, 6 Wall. 35; *Williams* v. *Fears*, 179 U.S. 270, 274; *Twining* v. *New Jersey*, 211 U.S. 78; *Edwards* v. *California*, 314 U.S. 160; *Kent* v. *Dulles*, 357 U.S. 116, 125; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Zemel* v. *Rusk*, 381 U.S. 1, 14; *United States* v. *Guest*, 383 U.S. 745, 757–758. In *Shapiro* the Court stated that it had "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision" (394 U.S. at 630), noting that in previous cases it had been grounded on the Privileges and Immunities Clauses of Art. IV, Sec. 2, and the Fourteenth Amendment, on the Commerce Clause, and on the Due Process Clause of the Fifth Amendment (*id.* at 630, n. 8).

pelling governmental interest for such a waiting period (see 394 U.S. at 627, 638).[11]

A similar analysis seems applicable in the instant case. While it is unlikely that many people are actually discouraged from moving because they would lose the right to vote in a presidential election—and residence requirements here presumably have no such purpose—the fact is that not allowing a person to vote simply because he recently moved imposes a penalty on the exercise of the freedom to travel. Had appellants not taken advantage of the right to move from California to Colorado, they would have been allowed to vote for President, but because they moved, they were denied the franchise.

To be sure, there are factual distinctions between this case and *Shapiro*. Here the franchise is denied only if an individual moves to another State within a certain period immediately preceding a presidential

[11] While the Court in *Shapiro* said that it did not intend to imply any view as to the validity of residence requirements determining voter eligibility (394 U.S. at 638, n. 21), and even suggested in passing that there might be some justification for such requirements (*ibid.*), former Chief Justice Warren, with Mr. Justice Black's concurrence, pointedly expressed the view in dissent that (394 U.S. at 654): "Despite the fact that in *Pruneda* v. *Dorfin*, 380 U.S. 125 (1965), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote."

election, while the plaintiffs in *Shapiro* were penalized for moving, whatever the time. This difference, however, does not affect application of the principle. Nor does the fact that the residence requirement for voting, in most places, prejudice only those who move in presidential election years make the resulting injury *de minimis*. *Somewhat surprisingly*, reliable statistics indicate that as many as five million voters were disenfranchised in the 1968 presidential election by residence requirements similar to that of Colorado. That such large numbers of persons are effectively prevented from voting is of itself cause for serious concern. But the significance of residence requirements is made even more obvious when it is noted that the popular-vote margin in two of the last three presidential contests—in 1960 and 1968—was less than 400,000 votes.

A Delaware district court has indicated that the vital need of welfare benefits differentiates such cases from litigation challenging voting residence requirements. *Green* v. *Department of Public Welfare*, 270 F. Supp. 173, 178 (D. Del.). However, the emphasis which this Court has increasingly placed on the right to vote would seem to undermine any notion that that right is entitled to less protection than the right to receive welfare assistance.[12] Restrictions on the franchise are distinctly not favored and the burden is on those who erect such barriers to justify them with compelling reasons. *E.g.*, *Carrington* v. *Rash*, *supra*;

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[12] See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370; *Wesberry* v. *Sanders*, 376 U.S. 1, 17–18; *Reynolds* v. *Sims*, 377 U.S. 533, 555; *Carrington* v. *Rash*, 380 U.S. 89, 96; *Katzenbach* v. *Morgan*, 384 U.S. 641, 652.

Kramer v. *Union School District*, 395 U.S. 621; *Cipriano* v. *City of Houma*, 395 U.S. 701. Because the right to vote is the essential political right preservative of all others,[13] and lies at the very core of our constitutional system,[14] the withholding of the franchise should plainly be viewed as a penalty, different in quality from the deprivation of the means to obtain food and shelter, but nonetheless a substantial interference with constitutional rights.

Here the Colorado statute, while placing no absolute prohibition on the right to travel—which was equally so in the *Shapiro* situation—in effect presented appellants with the choice of preserving either their right to travel freely[15] or their right to vote in the 1968 presidential election.[16] Such a statute, re-

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[13] *Yick Wo* v. *Hopkins*, *supra*; *Wesberry* v. *Sanders*, *supra*; *Katzenbach* v. *Morgan*, *supra*.

[14] *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Kramer* v. *Union School District*, *supra*.

[15] Appellant Richard Hall was moving from California after graduation from law school to Colorado in order to take up the practice of law. Thus, to have remained in California through November would have cost him over four months' salary and very likely would have resulted in delaying his admission to the Colorado bar. His wife, appellant Christine Hall, could have remained in California until November, but only by maintaining a separate residence from her husband there—with the expense and disruption of family life that would entail—for over four months.

[16] Although those 19 years of age who want to vote may in some respects be deterred in moving from Georgia to another State where the minimum voting age is 21, and a youthful driver may be deterred in moving to another State which issues licenses only to persons a year or two older, such restrictions do not fall into the category of penalties imposed solely because of the exercise of the right to travel. In this case and in *Shapiro* the penalty is imposed for one reason only—the ap-

quiring appellants to sacrifice one of their fundamental rights, gave them no effective choice at all. It should accordingly be viewed as imposing an unconstitutional burden on such individuals, so long as no compelling governmental interest is demonstrated by the State to justify this disparity in the treatment of old and new residents (*Shapiro* v. *Thompson*, *supra*, 394 U.S. at 634; see *infra*, pp. 18–21).

B. THE RIGHT TO PARTICIPATE IN THE PRESIDENTIAL SELECTION PROCESS

The offices of President and Vice President are federal positions which exist by virtue of the Constitution. See Art. II, Sec. 1; Twelfth Amendment. It has long been established that Congress may enact laws ensuring the proper conduct of the process by which presidents are chosen. See *Ex parte Yarbrough*, 110 U.S. 651; *Burroughs* v. *United States*, 290 U.S. 534. In upholding the right of Congress to prevent any interference with the right to vote for President and members of Congress, it has been determined that "the right to vote in federal elections is a privilege of national citizenship derived from the Constitution." *United States* v. *Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 353 (E.D. La.).[17] This Court itself, though

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plicant's not having resided in the State for a requisite period of time. Thus, appellants could not vote only because they were new residents. But a 19 year old Georgian or a young driver moving to another State is not deprived of the vote or a driver's license because he is a new resident, but simply because all persons—old and new residents alike—must be of a prescribed age to vote and to drive. Hence, he is not denied equal protection, and no penalty arising from the exercise of the right to travel is involved.

[17] Cf. *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Saylor*, 322 U.S. 385.

acknowledging that the Constitution entrusts to the States the function of conducting elections to fill federal offices and of prescribing qualifications for participation therein, has held that the right of participation is directly protected by the Constitution:

> [A]mong the rights and privileges of national citizenship recognized by this court are * * * the right to vote for National officers * * * [*Twining* v. *New Jersey*, 211 U.S. 78, 97.]

And, of all the federal officials selected, the preeminent place of the right to choose the President is obvious. See *Burroughs* v. *United States*, *supra*, 290 U.S. at 545; cf. *Pope* v. *Williams*, 193 U.S. 621, 633.

As discussed earlier (*supra*, pp. 9–12), neither the selection procedure for presidential electors nor the proper limits of a State's authority to control the eligibility of voters is spelled out in the Constitution. Nonetheless, the two offices involved are constitutionally created and it is a right of national citizenship to be allowed to participate in the selection of persons to fill them. The federal right involved, of course, no more than the right to participate on an equal basis in the process by which the electors in a given State are chosen, but the fact that the States may employ a selection method other than popular vote does not change the essential nature of the right.

Constitutional protection thus does not disappear "simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment [rather than popular election]" (*Kramer* v. *Union School District*, *supra*, 395 U.S. at

628–629; *Harper* v. *Virginia Bd. of Elections, supra,* 383 U.S. at 665; compare *Sailors* v. *Board of Education,* 387 U.S. 105, 108–109; *Fortson* v. *Morris,* 385 U.S. 231, 233). Once a State chooses the method to be used and that method involves popular participation, the right to participate in that process, so far as the election of the President and other federal officials is concerned, is an aspect of national citizenship. Cf. *United States* v. *Classic,* 313 U.S. 299; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461. Viewed in that posture, the right asserted here is even more entitled to federal constitutional protection than the right not to be discriminated against in receiving welfare assistance as a result of interstate movement that was involved in *Shapiro.*

II. COLORADO'S RESIDENCE REQUIREMENT IS NOT SUPPORTED BY A COMPELLING STATE INTEREST

In judging the validity of the waiting period for welfare benefits, the Court in *Shapiro* held that the right to travel was a fundamental right guaranteed by the Constitution and that such rights could not be burdened by the States unless there was a "compelling" reason for so doing (394 U.S. at 638):

> Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental

> **right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause.**

Because both the right of interstate travel and the right to participate in the selection process for presidential electors are aspects of national citizenship rooted in the Constitution, Colorado has an extremely heavy burden in seeking to justify its imposition of a residence requirement whose effect is to disenfranchise new residents such as appellants. Like the States in *Shapiro,* Colorado has failed to carry this burden, and its residence requirement accordingly "creates a classification which constitutes an invidious discrimination denying [appellants] equal protection of the laws" (394 U.S. at 627).

The purposes of the Colorado residence requirement, as explicated in several decisions by the Colorado Supreme Court, are the preservation of the purity of elections and the prevention of control of State affairs by persons who have no pecuniary interest in them (see A. 24). As the district court noted, the latter purpose is clearly inapplicable to the situation involved in the instant case, which concerns voting only in a presidential election (*ibid.*). So, also, the related notion that the voter should have an immediate familiarity with State and local issues simply has no significance with respect to voting for the President and Vice President, particularly in view of the extensive nationwide coverage given presidential elec-

tion campaigns by the news media and the "national community" that those leaders serve. Moreover, serious constitutional problems would arise if a substantial period of residence were demanded with the object of restricting the ballot to those who, through exposure to the special interests of the State, had become imbued with a particular point of view. See, *e.g.*, *Carrington* v. *Rash*, *supra*, 380 U.S. at 94; *Williams* v. *Rhodes*, *supra*, 393 U.S. at 30–31; *Cipriano* v. *City of Houma*, *supra*, 395 U.S. at 705–706.

As regards a State interest in preserving the purity of elections, the residence restriction does not appear to contribute significantly to efforts to prevent voting fraud and corruption. In Colorado, for example, there is apparently no cross-checking of those who meet the residence requirement to ensure that they have not voted by absentee ballot, or otherwise, in the State of their former residence. The residence requirement itself provides no sanctions for such double voting; the only available sanction, that of perjury, would apply even without the residence requirement. In *Shapiro* the Court was confronted by similar arguments in support of the residence requirement for welfare assistance, but concluded that other less drastic means were available to accomplish that purpose, as similarly exist in the instant case. Thus, this consideration, even if not insubstantial, hardly constitutes a compelling State interest so as to justify the statute as against challenge under the Equal Protection Clause.

While the Colorado statute provided that one must have resided in the State for six months—now shortened to two months—prior to the election in order to

be eligible to vote, one who meets the residence requirement can presumably present himself to the registrar as late as the Friday before the election and become a registered voter for purposes of the presidential contest. See Colorado Revised Statutes, Sec. 49–24–3 (1963). Of course the States may justifiably desire to set some cutoff date for registration in order to facilitate the necessary administrative procedures incident to conducting an election. Three days—including only one working day—has apparently been determined by Colorado to constitute a sufficient period of time within which to handle the administrative details related to closing and revising the voting rolls. It seems clear, then, that the statute prescribing the residence requirement does not serve any such purpose, but rather establishes an arbitrary waiting period which serves no governmental interest that can in any respect be characterized as compelling.

Finally, the decision in *Drueding* v. *Devlin,* 234 F. Supp. 721 (D. Md.), affirmed, 380 U.S. 125, does not stand as an obstacle to the Court's reaching the conclusion that the Colorado residence requirement is unconstitutional. Although, in that case, the Court upheld a one-year residence requirement for voting for presidential electors imposed under Maryland law, the district court's opinion, which was affirmed *per curiam* and without opinion, reasoned that "the real question" in the case was whether the statute is "so unreasonable as to amount to a prohibited discrimination" (234 F. Supp. at 724). In view of the Court's recent repeated articulation of a more stringent constitutional standard in voting and right to travel

cases (*e.g., Shapiro* v. *Thompson, supra; Kramer* v. *Union School District, supra; Cipriano* v. *City of Houma, supra*)—*i.e.*, whether the statute is justified by a compelling governmental interest—the basis of the holding in *Drueding* has already been seriously undermined.

Reliance here by the district court (A. 23–25) on the ordinary equal protection test of whether a State legislative determination is wholly without a reasonable foundation (*e.g., McGowan* v. *Maryland*, 366 U.S. 420) is entirely misplaced. That standard is not applicable in voting and right to travel cases; *a fortiori*, it is inapposite where *both* the right to vote and the right of interstate travel are involved, as here, in the same case. Rather, the pertinent test is whether the distinction made or different treatment accorded individuals otherwise similarly situated reflects some "compelling State interest" so as to withstand rigid constitutional scrutiny. Here the district court, relying on *Drueding*, applied the wrong standard in concluding that the Colorado residence requirement was "not so unreasonable as to amount to an irrational discrimination" (A. 24). As this Court recently stated in *Kramer* v. *Union School District, supra*, 395 U.S. at 626–627, a voting case, in language tracking the standard enunciated for right to travel cases in *Shapiro:*

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide

> residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. * * *

Neither the Colorado statute, nor indeed the Maryland statute involved in *Drueding*, can withstand application of the "compelling state interest" test. Accordingly, in burdening appellants' right to travel and impairing their right to vote in a presidential election without sound justification, the Colorado statute, by arbitrarily discriminating against them and others like them, violates the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and this Court should hold the Colorado residence requirement unconstitutional.

Respectfully submitted.

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